

MEMORANDUM OF LAW

DATE: August 31, 1995

TO: Civil Service Commission

FROM: City Attorney

SUBJECT: Minimum Qualification Requirement

QUESTION PRESENTED

May a minimum qualification noticed in a promotional examination announcement be waived?

SHORT ANSWER

Yes. The San Diego Municipal Code ("SDMC") indicates that certain qualification requirements may be waived by the appropriate body. In this case, it is our opinion that this issue has already been resolved by the appropriate authority (the City Manager) through the grievance process. We have, nevertheless, provided an analysis of the waiver issue.

BACKGROUND

The circumstances in this case are unique and therefore will be explained in some detail. Briefly, the issue arose because one candidate for a supervisory position, Leon Crowder has complained that another candidate for the position, Benjamin Torres was inappropriately granted a waiver of a minimum qualification. Mr. Crowder further alleges that the inappropriate waiver invalidates the appointment.

In November 1992 a promotional examination announcement for District Refuse Collection Supervisor was published by the Personnel Department. One of the requirements listed was that an applicant have a valid California Class B license and a current valid Department of Motor Vehicles ("DMV") medical certification for the license at the time of the interview.

Pursuant to the Civil Service rules, a request for a certified list of eligible employees for the promotional position was made by Environmental Services Department. Personnel Department responded by providing to Environmental Services Department a certified list of eligibles. Each employee certified by the Personnel Department met the minimum qualifications required by the class specifications for the position. Ironically, at this juncture, Mr. Torres met the department requirements too, in that he had a DMV certification both when he applied for the position and when he was certified.

The Personnel Manual states that: "All eligibles certified from promotional eligible lists shall be notified of certification by the Personnel Department and shall be granted an interview, within a reasonable period of time by the appropriate appointing authority." Personnel Manual E-5(E)1. Pursuant to this section, Environmental Services Department had no discretion over which eligible employees it would interview and was required to interview all certified employees. Subsequently, the department selected Mr. Torres for the position.

Mr. Torres, however, did not possess a valid DMV medical certificate for his Class B license at the time of the interviews on May 25, and July 8, 1993. Mr. Torres previously held a valid license and certification for some time prior to the interview. Mr. Torres first obtained a Class B license in May 1983. He had renewed both the license and medical certification at each renewal period thereafter until April 26, 1993, when the medical certification expired. Prior to its expiration, on February 15, 1993, Mr. Torres was injured and suffered a broken wrist. As a result of the break, at the time of his required DMV medical examination on April 16, 1993, Mr. Torres was advised by the physician to wait until the wrist healed to renew his certification. Mr. Torres was cleared to return to full duty, including driving, by his personal physician on April 29, 1993, a month prior to his promotional interview. However, City rules require employees be cleared by a City doctor before the medical certifications can be reissued. At no time did Mr. Torres' Class B license expire.

Mr. Torres went through two interviews for the supervisor position, as did the other final candidates. Although his physician had cleared Mr. Torres for full duty, the City doctor did not clear Mr. Torres for full duty until July 20, 1993. The DMV medical certification was reissued at that time. As a result of Mr. Torres' medical certification being held in abeyance due to his broken wrist, Mr. Crowder, another applicant for the position, challenged the appointment. He claimed Mr. Torres did not meet the minimum qualifications for the job, that Environmental Services Department erroneously waived the requirement, and Mr. Torres was, therefore, inappropriately appointed.

Subsequent to Mr. Torres' appointment, Mr. Crowder filed a grievance. Environmental Services Department then spoke to the Personnel Director on August 10, 1993, and asked if it had appropriately waived the certification requirement. The Personnel Director indicated the waiver was appropriate in these circumstances. The grievance was denied. After his grievance was denied, Mr. Crowder filed discrimination complaints with the City's Equal Employment Investigative Officer ("EEIO") and the Department of Fair Employment and Housing ("DFEH"). Following independent investigations, each agency reached a "no cause" finding. Finally, the issue has been brought to the Commission. This memorandum addresses whether the requirement could be

waived and whether Mr. Torres' appointment was inappropriate. We think the requirement was properly waived and the appointment, therefore, appropriate.

ANALYSIS

I. The waiver issue in this case is not properly before the Commission.

There is a threshold issue which must be addressed before an analysis of the waiver issue is done. That issue is whether it is appropriate for the Commission to hear Mr. Crowder's complaint at this time. Mr. Crowder originally filed a grievance on this issue. By doing so, he selected the process he preferred for resolution of his dispute. The grievance procedure has been negotiated through the meet and confer process with the Municipal Employees Association ("MEA"), Mr. Crowder's recognized bargaining representative. The procedure is embodied in Article 5 of the Memorandum of Understanding ("MOU").

This process provides five (5) levels of hearings. The Step 1 hearing is conducted by the employee's immediate supervisor. The hearings progress up the management ladder to department heads in Step 4. Step 5 is the final resolution of the grievance. This step provides that the grievance shall be heard by the City Manager or his designee, or by the Commission if the issue is one over which the Commission has authority. The decision to have the appeal heard by the Labor Relations Manager was properly made by the Management Team.

The DMV certification requirement was a departmental rather than a Commission requirement, thus the grievance was properly before the Labor Relations Manager. The Step 5 hearing is an either/or proposition. There is no provision for being heard by both the City Manager and the Commission. Thus, this issue is not appropriately before the Commission.

Mr. Crowder's ultimate hearing officer in the grievance procedure is a hearing before City Council. If such a request is made in a timely manner, the City Manager must refer the issue to Council. The referral is not discretionary with the City Manager. Mr. Crowder did not request a Council hearing and therefore has exhausted his administrative remedies. In our view this issue is not properly before the Commission.

Should the Commission however, decide to pursue this matter further, we have provided an analysis of the waiver issue:

II. Propriety of the waiver.

The authority for, and powers of, the Commission are contained in three documents: the San Diego City Charter ("Charter"), the San Diego Municipal Code, and the Personnel Manual. Taken together these sources provide direction and guidance for the day to day conduct of the City's personnel system. In determining who has the authority to waive the requirements noted on the promotional announcement, we must look to each of these sources and determine how the requirements are promulgated.

The standard City practice regarding waiver of rules is that such rules can be waived or amended by the body which promulgated the rules. The Charter and SDMC have the force of law. Thus, Charter requirements cannot be waived and an amendment to it requires a vote of the people. Similarly, the SDMC cannot be waived, but it may be amended by the City Council.

Conversely, Council policies may be waived by Council and Administrative Regulations promulgated by the City Manager may be waived by the City Manager. Following the usual City practice, the Commission, therefore, may waive its regulations and a department may waive its own requirements. However, although City practice allows waiver by the promulgating authority, this practice has not been reduced to writing.

SDMC section 23.1303 provides that an applicant for employment must "unless waived" meet the minimum qualifications listed as necessary for that job. The SDMC does not indicate how a requirement may be waived. Additionally, SDMC section 23.0202 provides that class specifications be prepared by the Personnel Director, and adopted by the Commission. Personnel Department analysts conduct classification studies and publish class specifications "based upon and graded according to the duties and responsibilities . . . to provide for standardization and classification of all positions in the classified service of the City." SDMC Section 23.0202.

The classification specifications for District Refuse Collection Supervisor indicate that applicants must have a Class B license (formerly Class II) (see attachment). They do not indicate a requirement for a concurrent medical certification. The two requirements are distinct as shown by the fact that the Class B license is issued for four years, while the DMV medical certificate must be renewed every two years. When Mr. Torres' medical certification expired on April 26, 1993, his Class B license was unexpired. Therefore, he met the technical requirements of the class specifications promulgated by the Personnel Director and adopted by the Commission.

The Personnel Director has indicated that the DMV medical certification requirement, as well as the time frame in which it was required to be provided, was a requirement added by the Environmental Services Department. Because the medical certification was a department requirement, during the certification process conducted by the Personnel Department, the analysts did not check for the DMV medical certifications of eligibles. Employees are certified to the eligible list if they meet the minimum requirements of the Personnel Department only. Mr. Torres was, therefore, appropriately certified.

No written provisions in either the SDMC or the Personnel Regulations indicate how conditions imposed by the department, rather than the Personnel Director, may be waived. However, as previously noted, City past practice dictates that the body making the rule may

waive the rule. Moreover, Mr. Torres had, at the time of the interview, been cleared by his doctor to return to full duty even though he had not been cleared by the City doctor. Thus, the lack of valid DMV certification was a technical deviation from department requirements. It was clear to the Environmental Services Department that Mr. Torres had qualified for his medical certification in the past and would qualify again in the near future.

The medical certification was reissued by the City doctor on July 20, 1995, twelve (12) days after Mr. Torres' second selection interview. Shortly thereafter the department became aware that Mr. Torres' medical certification status was an issue. The department then contacted the Personnel Director to verify that it had acted appropriately in waiving the departmental certification requirement. The Personnel Director indicated the department's action had been appropriate. Thus, absent any contrary regulations, the Personnel Department and Environmental Services Department acted within their authority.

Even if the Commission determines the appointment was invalid, the Commission has the power to ratify the appointment at this time if it chooses to do so. As stated by Assistant City Attorney John Kaheny in his memorandum of law dated December 2, 1987:

Generally speaking, when a vacancy in a public office occurs, it can only be legally filled by the authority designated by law to fill it in accordance with the established statutory procedures. This principle applies to both promotion and new hires. When a public employee is appointed by mistake or error, he or she is referred to as a "de facto employee." The term "de jure employee" is used in reference to an employee whose appointment is valid. *Smith v. County Engineer*, 266 Cal. App. 2d 645 (1968). The general rule is that a technically illegal appointment can be ratified by the municipal body or officer who has power to make the initial appointment once the defect is cured. *State v. Basile*, 174 Conn. 36 (1977). Therefore, the employee who did not possess the proper qualifications on the date of hire but who now possesses those qualifications may now be validly appointed. In regard to his past service to The City of San Diego, the general rule is that one who becomes a public employee de facto, without bad faith, dishonesty, or fraud on his part and who

renders the required services should be permitted to recover the normal compensation provided by law for such services during the period of their rendition. O'Connor v. Calandrillo, 117 N.S. Super 586, 285 App. 2d 275, Aff'd 121 N.J. Super 135, 296 A.2d 326, cert. denied 412 U.S. 940, 37 L. Ed.2d 399, 93 S.Ct. 2775 (1971).

In this instance the department knew Mr. Torres' medical certification would be restored shortly. He had, after all, been cleared to return to full duty by his physician. Additionally, the department has indicated that Mr. Torres has performed in the position for the past two years in an exemplary fashion since becoming District Refuse Collection Supervisor as a de facto employee. The courts have frequently noted that in determining the application of a general rule to a particular situation "we must look to the substance of the transaction and not allow mere form to dictate the result." King v. Central Bank, 18 Cal. 3d 840, 847 (1977). Equitable arguments favor ratification of Mr. Torres' appointment should the Commission find the appointment was invalid.

CONCLUSION

Mr. Crowder has exhausted his administrative remedies and is not appropriately before the Commission at this time. Nevertheless, the past practice of City waiver procedures would indicate that the Environmental Service Department acted appropriately in waiving its own requirement. In the alternative, if the waiver was inappropriate, the Commission has the authority to ratify Mr. Torres' appointment at this time if it chooses to do so.

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By

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